IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 20, 2004

STATE OF TENNESSEE v. CHARLES BENSON

Appeal from the Circuit Court for Bedford County
No. 15101 Charles Lee, Judge

No. M2003-02127-CCA-R3-CD - Filed October 8, 2004

A Bedford County Criminal Court jury convicted the defendant, Charles Benson, of possession of a schedule II controlled substance with intent to sell and of possession of a schedule II controlled substance with intent to deliver, both Class B felonies. The trial court merged the two convictions and sentenced the defendant on the possession with intent to sell count as a Range II, multiple offender to twenty years in the Tennessee Department of Correction. The defendant appeals, claiming that (1) the evidence is insufficient to support his conviction; (2) the trial court erred by denying his motion to suppress evidence; and (3) his sentence is excessive. We conclude that the evidence is sufficient and that the trial court properly denied the defendant's motion to suppress. Although we hold that the trial court improperly relied on certain enhancement factors in light of Blakely v. Washington, 542 U.S. ___, 124 S. Ct. 2531 (2004), we conclude that the record supports a sentence of twenty years. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Merrilyn Feirman, Nashville, Tennessee (on appeal), Donna Leigh Hargrove, District Public Defender, and Andrew Jackson Dearing, III, Assistant Public Defender (at trial), for the appellant, Charles Benson.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael David Randles and Ann L. Filer, Assistant District Atttorneys General, for the appellee, State of Tennessee.

OPINION

This case relates to the defendant's possession of 3.3 grams of crack cocaine on January 25, 2001. Bedford County Sheriff's Deputy Scott Jones testified that about 3:45 a.m. on January 25, he was traveling northbound on Highway 41A in Bedford County. He stated that as the defendant's car

approached him, it crossed the double yellow line and was almost completely in his lane of travel. This forced Deputy Jones to veer his cruiser into the emergency lane in order to avoid a head-on collision. Deputy Jones testified that he immediately turned his cruiser around and stopped the defendant's car in order to determine what had caused the defendant to cross so far over the center line. Deputy Jones said that upon approaching the defendant's car, he was able to detect a strong odor of alcohol about him. Deputy Jones stated that he asked the defendant to produce his driver's license and perform two separate field sobriety tests, which the defendant passed. About that time, Bedford County Sheriff's Deputy Bob Filer arrived on the scene. Deputy Filer testified that he heard Deputy Jones ask the defendant if he had any illegal contraband or alcohol in his car. He said that the defendant answered he did not have anything illegal in the car and that Deputy Jones asked the defendant for permission to search it. Deputy Filer further testified that he told the defendant that he did not have to consent to the search and that the defendant gave his consent. Upon a thorough search of the car's passenger compartment, Deputies Jones and Filer found a plastic bag under the driver's seat containing what the deputies suspected was crack cocaine. Deputy Jones arrested the defendant.

Phillip W. Freeze, of the Tennessee Bureau of Investigation, testified that the substance found in the defendant's car was 3.3 grams of crack cocaine. Tim Lane, Director of the Seventeeth Judicial District Drug Task Force, testified that the "street value" of crack cocaine was approximately two hundred dollars per gram. Director Lane further stated that the possession of 3.3 grams of crack cocaine in Bedford County would be considered "a substantial amount of crack cocaine." Director Lane explained that usually crack cocaine addicts in Bedford County did not possess more than one or two grams of the substance at any one time because "they never have any money." The jury convicted the defendant of possession of a schedule II substance with the intent to sell and deliver, and the trial court merged the two counts.

I. SUFFICIENCY OF THE EVIDENCE

The defendant claims that the evidence is insufficient to support his conviction because the state failed to prove that he intended to sell or deliver the crack cocaine. Specifically, he argues that no other relevant facts surrounding his arrest existed from which a jury could infer that the crack cocaine was possessed with the requisite intent to sell or deliver it. The defendant notes that the police found no weapon, cell phone, pager, or scale in his car; that the crack cocaine was in one bag instead of being packaged in multiple bags; that he did not have a large amount of cash on his person; and that he was not engaged in any activities related to the sale of drugs at the time of his arrest.

Our standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). We do not reweigh the evidence; rather, we presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d

542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). In Tennessee, questions about witness credibility are resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

A conviction for possession of crack cocaine for resale or delivery requires proof that the defendant knowingly possessed the substance with the intent to sell or deliver it. See T.C.A. § 39-17-417 (2003). The one element present in almost all criminal offenses which is most often proven by circumstantial evidence is that relating to the culpable mental state. See State v. Hall, 490 S.W.2d 495, 496 (Tenn. 1973). Other than an accused stating his or her purpose, intent, or thinking at the relevant times, the trier of fact is left to determine the mental state by making inferences drawn from the surrounding circumstances found by it to exist. See, e.g., Poag v. State, 567 S.W.2d 775 (Tenn. Crim. App. 1978). Pursuant to T.C.A. § 39-17-419 "[i]t may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." With respect to this inference, our review is only to consider whether "under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference" beyond a reasonable doubt. County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S. Ct. 2213, 2225 (1979). In other words, even though circumstantial evidence is needed for one element, the standard for evidence sufficiency remains the same.

In interpreting T.C.A. § 39-17-419, this court has determined that many facts and circumstances exist from which a jury may properly draw an inference that an accused intended to sell or deliver controlled substances. See State v. Brown, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995) (manner of packaging of drugs and absence of drug paraphernalia may support inference of possession with intent to sell, rather than possession for personal use); State v. Matthews, 805 S.W.2d 776, 782 (Tenn. Crim. App. 1990) (finding it proper for a jury to consider "the amount and value of a controlled substance . . . to infer an intention to distribute"); see also State v. Harold Wayne Shaw, No. 01C01-9312-CR-00439, Davidson County (Tenn. Crim. App. Oct. 24, 1996) (absence of drug paraphernalia and no proof at trial of personal use supported inference and conviction). This court has also held that it is not improper for an officer to testify as to the different traits of drug users and dealers. See State v. William Aubrey Trotter, No. 01C01-9701-CR-00019, Davidson County (Tenn. Crim. App. Feb. 24, 1998).

We do not necessarily reject out of hand the defendant's contention that, standing alone, the defendant's possession of 3.3 grams of cocaine is insufficient to support an inference of an intent to sell or deliver. See, e.g., Turner v. United States, 396 U.S. 398, 423, 90 S. Ct. 642, 656 (1970) (stating that mere possession of 14.68 grams of mixture containing cocaine and sugar is "consistent with . . . possessing the cocaine not for sale but exclusively for his personal use"). However, in the light most favorable to the state, the evidence shows that the defendant had no drug paraphernalia of the type used for consumption of crack cocaine in his car; that the total value of crack cocaine in this case was over six hundred dollars; that Director Lane testified that the 3.3 grams of cocaine seized from the defendant was more consistent with the amount possessed by a drug seller than by

a drug addict; and that no proof at trial indicated that the defendant only intended to consume the cocaine. We conclude that the evidence was sufficient for the jury to find beyond a reasonable doubt that the defendant possessed the cocaine with the intent to sell and deliver it.

II. MOTION TO SUPPRESS

The defendant claims that the trial court should have granted his motion to suppress the cocaine pursuant to the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. He claims the trial court should have granted this motion because (1) Deputy Jones had no justification to stop his car; (2) the investigation into his suspected intoxication had ended, and any detention thereafter for the purpose of searching his car was unreasonable; and (3) the consent he gave the Bedford County Deputies to search his car was not freely given.

At the suppression hearing, Deputy Jones testified that he stopped the defendant because the defendant's car nearly hit him as it swerved almost completely into the oncoming lane of traffic. Deputy Jones also testified that although the defendant passed the field sobriety tests, he was not one hundred percent certain the defendant was capable of driving and that was why he asked the defendant for permission to search the car. He said that he told the defendant he wanted to search the car for illegal contraband. Deputy Jones testified that during the search, he placed the defendant in the rear, passenger side seat of his cruiser, with the door open. Deputy Jones said that he placed the defendant in the cruiser because it was cold outside, not because he wanted to detain him. Deputy Filer testified that he told the defendant that he had the right to refuse consent. Deputy Filer stated that he twice informed the defendant of this right and that the defendant indicated he understood. The trial court denied the motion and held that Deputy Jones did not violate the defendant's Fourth Amendment rights by stopping the car, that Deputy Jones was still investigating when he asked to search the car, and that the defendant consented to the search.

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions of the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The defendant first claims that the stop of his car was a violation of his Fourth Amendment rights. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures, and "'article 1, section 7 [of the Tennessee Constitution] is identical in intent and purpose with the Fourth Amendment.'" State v. Downey, 945 S.W.2d 102, 106 (Tenn. 1997) (quoting Sneed v. State, 221 Tenn. 6, 13, 423 S.W.2d 857, 860 (1968)). An automobile stop constitutes a seizure within the meaning of both the Fourth Amendment of the United States Constitution and article I, section 7 of the Tennessee Constitution. See Michigan Dep't of State

Police v. Sitz, 496 U.S. 444, 450, 110 S. Ct. 2481, 2485 (1990); State v. Pully, 863 S.W.2d 29, 30 (Tenn. 1993); State v. Binion, 900 S.W.2d 702, 705 (Tenn. Crim. App. 1994). The police may stop a vehicle if they have reasonable suspicion based upon specific and articulable facts that an occupant is violating or is about to violate the law. See United States v. Brignoni-Ponce, 422 U.S. 873, 881, 95 S. Ct. 2574, 2580 (1975); State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992); Hughes v. State, 588 S.W.2d 296, 305 (Tenn. 1979). In determining whether an officer's reasonable suspicion is supported by specific and articulable facts, "a court must consider the totality of the circumstances–the entire picture." State v. Moore, 775 S.W.2d 372, 377 (Tenn. Crim. App. 1989).

At the suppression hearing, Deputy Jones testified that the defendant's car nearly collided with his cruiser when it almost completely crossed the double yellow line and veered into the oncoming traffic lane. Deputy Jones could stop the defendant for illegally crossing the double yellow line and entering the oncoming lane of traffic. See T.C.A. § 55-8-121. Therefore, the defendant's contention that the stop of his car was a violation of the Fourth Amendment and article I, section 7 of the Tennessee Constitution is without merit.

The defendant also contends that Deputy Jones' testimony at the suppression hearing was inconsistent with his written report. He points to Deputy Jones' written report which indicated that the defendant, after passing the field sobriety tests, was capable of driving his car. However, Deputy Jones testified at the hearing that he was not one hundred percent certain as to the defendant's intoxication or lack thereof.

The defendant argues that the inconsistency between Deputy Jones' written report and his testimony at the hearing requires this court to hold that the continued investigation, when the defendant should have been allowed to leave, was an unreasonable detention notwithstanding his subsequent consent to search. This argument ignores the fact that the trial court resolved the inconsistency by determining that Deputy Jones' testimony at the suppression hearing was credible. We must give deference to the trial court's assessment of witness credibility and resolution of conflicting testimony.

Finally, the defendant argues that his consent to search was not freely given. He argues that he was under duress or, in the alternative, coerced into giving consent based upon (1) the fact that it was 4:00 a.m., (2) the fact that there were two armed deputies present, and (3) the fact that he was not free to leave.

The analysis of any warrantless search must begin with the proposition that such searches are per se unreasonable under the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. This principle against warrantless searches is subject only to a few specifically established and well-delineated exceptions. See Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); State v. Tyler, 598 S.W.2d 798, 801 (Tenn. Crim. App. 1980). Before the fruits of a warrantless search are admissible as evidence, the state must establish by a preponderance of the evidence that the search falls into one of the narrowly drawn exceptions to the warrant requirement. See State v. Shaw, 603 S.W.2d 741, 742 (Tenn. Crim. App. 1980). A

warrant is not needed when there is a consent that is "unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). Thus, the question becomes whether the consent to the search was given voluntarily. See State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993).

Deputy Jones testified that the defendant was not under arrest at the time of the search and that he placed the defendant on the passenger side seat of the cruiser, with the door open. Deputy Jones also testified that he told the defendant that he wanted to search the car for illegal contraband. Deputy Filer testified that he twice informed the defendant that he did not have to consent to the search. Even after being told that he did not have to consent to the search, the defendant gave consent. Under these circumstances, the defendant's consent was freely given. The trial court properly denied the motion to suppress.

III. EXCESSIVE SENTENCE

Finally, the defendant claims that his sentence is excessive. Specifically, he contends that the trial court erred by giving too much weight to the enhancement factor relating to his previous felony conviction used for enhancement within Range II and that the trial court violated the rule announced in Blakely v. Washington, 542 U.S. __, 124 S. Ct. 2531 (2004). He also contends that the trial court erred in not applying mitigating factors (1) and (13). We conclude that although the trial court improperly applied enhancement factors (9) and (14) and should have applied mitigating factor (1), the record justifies a sentence of twenty years.

No witnesses testified at the sentencing hearing. The court relied upon the presentence report and the arguments of counsel in making its decision. According to the presentence report, the defendant has three prior felony convictions, and he was also convicted of various misdemeanors, including possession of marijuana, possession of drug paraphernalia, criminal trespass, disorderly conduct, and assault. Two of the felony convictions supported the defendant's being a Range II, multiple offender. The report also shows that the defendant was employed at the time of his arrest. The state argued that the third felony conviction should be given great weight as an enhancement factor. The state also urged the court to apply as an enhancement factor that the crime was committed while the defendant was on parole. The defendant acknowledged that he was a Range II, multiple offender and did not object to the fact that the court could apply one of his felony convictions as an enhancement factor. However, the defendant argued that his work history and the fact that his conduct did not cause or threaten serious bodily injury were mitigating factors.

The trial court applied enhancement factors (2), that the defendant "has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," (9), that the defendant "has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community," and (14), that the defendant committed the crime while on parole from a prior felony. See T.C.A. § 40-35-114(2), (9), (14). The court refused to apply mitigating factor (1), that the criminal conduct "neither caused nor threatened serious bodily injury," because the court held that the sale of crack cocaine did threaten serious

bodily injury. The court also refused to consider the defendant's work history under factor (13)–the "catch-all" mitigating factor. Cf. T.C.A. § 40-35-113(1), (13). After placing great weight on the defendant's criminal history, the court sentenced him to twenty years, the maximum sentence within the range.

Our review of sentencing is de novo on the record with a presumption of correctness below. T.C.A. § 40-35-401(d). After imposition of the sentence, the defendant carries the burden to show that the sentence is improper. Therefore, as long as the trial court followed the statutory sentencing scheme, made findings of fact in the record, and gave due consideration in weighing the factors and principles relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In order for the presumption of correctness below to attach, there must be an "affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this respect, for purposes of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994) (citation omitted).

When conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see also Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn. 1986).

In Tennessee, the range of punishment for a Range II defendant convicted of a Class B felony is twelve to twenty years. T.C.A. § 40-35-112(b)(2). The appropriate sentence for a Class B felony is presumptively the minimum sentence unless there are enhancement factors present. T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d)-(e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Ashby, 823 S.W.2d at 169; Moss, 727 S.W.2d at 237.

The defendant claims that the trial court violated his right to trial by jury, guaranteed to him by the Due Process Clause of the Fourteenth Amendment, when it enhanced his sentence, at least in part, by finding facts not submitted to the jury and proven beyond a reasonable doubt. See Blakely, 542 U.S. at ___, 124 S. Ct. at 2537. The state claims that the defendant has waived any issue regarding Blakely and that any error by the trial court was harmless beyond a reasonable doubt.

A. Waiver

The state contends that the defendant has waived any Blakely issue because he failed to raise it in the trial court. The United States Supreme Court has stated that "[w]hen a decision of this Court results in a 'new rule,' that rule applies to all criminal cases still pending on direct review." Schriro v. Summerlin, ___ U.S. ___, ___, 124 S. Ct. 2519, 2522 (2004). The state argues that Blakely does not establish a new rule but merely clarifies the rule announced in Apprendi v. New Jersey, 530 U.S. 466, 120, S. Ct. 2348 (2000). In support of its argument, the state notes that the Supreme Court stated in Blakely that "[t]his case requires us to apply the rule we expressed in Apprendi." Blakely, 542 U.S. at ___, 124 S. Ct. at 2536.

A case "'announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government.'" Van Tran v. State, 66 S.W.3d 790, 810-11 (Tenn. 2001) (quoting Teague v. Lane, 489 U.S. 288, 301, 109 S. Ct. 1060, 1070 (1989)). "To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301, 109 S. Ct. at 1070.

In Apprendi, the defendant was convicted of many offenses, including second degree possession of a firearm for an unlawful purpose, for shooting into an African-American family's home. Although state law prescribed a sentence of five to ten years for a second degree offense, a New Jersey hate crime statute provided that a judge could enhance the defendant's sentence above the maximum in the range if the crime was racially motivated. Pursuant to the statute, the trial court sentenced the defendant to twelve years in confinement. The Supreme Court reversed, holding that, other than the fact of a prior conviction, the Constitution requires the jury to find beyond a reasonable doubt any fact that increases the penalty for a crime beyond the "prescribed statutory maximum." 530 U.S. at 490, 120 S. Ct. at 2362-63.

The state contends that Blakely merely extends the rule announced in Apprendi. However, in Graham v. State, 90 S.W.3d 687, 692 (Tenn. 2002), our supreme court held that the noncapital sentencing procedure in this state complied with Apprendi, saying,

> In Apprendi, the United States Supreme Court reviewed a New Jersey provision that allowed a judge to impose a sentence exceeding the statutory maximum for an offense if the judge finds, by a preponderance of the evidence, that the offense constituted a hate crime. The [Tennessee] Supreme Court struck the provision down, holding that due process requires that "any fact, other than a previous

> conviction, used to enhance a sentence above the statutory maximum must be: (1) charged in the indictment, (2) submitted to the jury, and (3) proven beyond a reasonable doubt." State v. Dellinger, 79 S.W.3d 458, 466 (Tenn. 2002) (quoting Apprendi, 530 U.S. at 476, 120 S. Ct. 2348). However, the Court emphasized that the judge still retains his discretion to consider all enhancing and mitigating factors "within the range prescribed by the statute." Apprendi, 530 U.S. at 481, 120 S. Ct. 2348 (emphasis added).
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> The petitioner in this case received a sentence within the statutory maximum for each crime. Accordingly, the trial court was well within its constitutional and statutory authority to consider enhancing factors for the purpose of sentencing without the assistance of the jury. Thus, Apprendi provides the petitioner with no relief.

We acknowledge that Blakely extended Apprendi's holding that, under the Sixth Amendment, a jury must find all facts used to increase a defendant's sentence beyond the statutory maximum. However, nothing in Apprendi suggested that the phrase "statutory maximum" equated to anything other than the maximum in the range. To the contrary, the United States Supreme Court stated the issue in Apprendi as "whether the 12-year sentence imposed . . . was permissible, given that it was above the 10-year maximum for the offense charged in that count." 530 U.S. at 474, 120 S. Ct. at 2354. We also note that the Supreme Court has considered the retroactive effect of the holding in Ring v. Arizona, 536 U.S. 584, 592-93, 122 S. Ct. 2428, 2435 n.1 (2002), as a new rule for capital cases even though it was based on Apprendi. See Schriro, ___ U.S. at ___, 124 S. Ct. at 2526-27. Perhaps this resulted from the fact that Ring overruled a case that had held the opposite. See Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990). In this regard, with our own supreme court expressly approving our sentencing procedure under Apprendi, we have a difficult time faulting a defendant in Tennessee for not raising the issue before Blakely. We conclude that Blakely alters Tennessee courts' interpretation of the phrase "statutory maximum" and establishes a new rule in this state. The defendant's raising the issue while his direct appeal was still pending is proper.

In any event, even if Blakely did not establish a new rule, the United States Supreme Court in Apprendi stated that the defendant's right to have a jury find facts that increase his sentence above the prescribed statutory maximum is rooted in his Fourteenth Amendment right to due process and his Sixth Amendment right to a jury trial. 530 U.S. at 476, 120 S. Ct. at 2355. In State v. Ellis, 953 S.W.2d 216, 220 (Tenn. Crim. App. 1997), this court held that although there was no common law right to waive a jury trial, Rule 23, Tenn. R. Crim. P., allowed a defendant to "waive a jury trial if the waiver is in writing and is knowingly executed." Absent a written waiver, "it must appear from the record that the defendant personally gave express consent [to waive a jury trial] in open court." Ellis, 953 S.W.2d at 221. Blakely, as an extension of Apprendi, also requires proof in the record that the defendant personally waived that right. The defendant did not waive that right in this case, and the denial of this right cannot be harmless error. See id. at 222.

B. Application of Blakely

The trial court applied enhancement factor (2) based upon the fact that the defendant had many prior convictions. Blakely specifies that a trial court may enhance a sentence based upon prior convictions. Thus, the trial court's application of factor (2) for the defendant's prior convictions was proper. However, the trial court also applied factors (9) and (13). We believe that the trial court's application of these factors violates Blakely.

Apprendi provides that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. Blakely extended this rule and held,

> the "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. . . . In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.

542 U.S. at __, 124 S. Ct. at 2537 (emphasis in original).

In this case, the trial court enhanced the defendant's sentence after applying enhancement factors (2), (9) and (14). When the trial court found that the defendant had previously failed to comply with conditions of release, factor (9), and that the defendant committed the instant offense while on parole, factor (14), it violated the defendant's Fourteenth Amendment Due Process rights as articulated in Blakely. Because the trial court erred in sentencing the defendant, we will review the defendant's sentence de novo with no presumption of correctness.

The record indicates that the defendant has been convicted of three felonies, two of which were used to categorize him as a Range II, multiple offender. The record also indicates that the defendant has been convicted of various misdemeanor offenses including possession of marijuana, possession of drug paraphernalia, criminal trespass, disorderly conduct, and assault. Therefore, for purposes of enhancing the defendant's sentence within Range II, we may consider the third felony conviction and all of the misdemeanor convictions and sentence the defendant to any term of confinement from twelve to twenty years without offending Blakely.

Tennessee law provides for certain factors to be considered when sentencing a defendant. Specifically, the General Assembly has provided that sentences involving terms of confinement should be based upon these factors:

> (A) Confinement is necessary to protect society by restraining the defendant who has a long history of criminal conduct;

> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

T.C.A. § 40-35-103(1). Another factor to consider in determining the length of a sentence is the defendant's potential for rehabilitation. Id. at § 40-35-103(5).

We note from the record that the defendant's third felony conviction was for violating the same provision of Tennessee's Drug Control Act as in this case. We also note that the defendant has had an unending string of misdemeanor and felony convictions from his eighteenth birthday until the present offense. We believe that an upward adjustment within the Range is justified based upon the foregoing sentencing considerations and the record as a whole.

Regarding mitigation, the defendant claims that the trial court erred by refusing to apply mitigating factor (1), that the defendant's conduct did not threaten bodily injury. In refusing to apply factor (1), the trial court stated,

> the Court is of the opinion that the mitigating factor that the defendant's conduct did not involve a threat of bodily injury is not correct because there was the threat in this case, the real threat that these were to be sold to someone, and that cocaine, by [its] very nature, involves threat of bodily injury.

This court was recently split on the question of whether the very nature of cocaine is sufficient to establish a per se rule that mitigating factor (1) does not apply. See State v. Ross, 49 S.W.3d 833, 848 (Tenn. 2002) (recognizing that this court had "split on the issue of whether a per se exclusion of . . . mitigating factor [(1)] is warranted in cocaine possession cases"). However, in Ross, our supreme court stated that

> mitigating factor [(1)] focuses not on the circumstances of the crime committed by a defendant as do many of the other mitigating and enhancing factors. Rather, this factor focuses upon the defendant's conduct in committing the crime. Although cocaine itself may well be, in the words of the trial court, an "inherently addictive and dangerous substance," this fact alone says nothing about the appellant's criminal conduct . . . .

The court then noted that it saw

> no evidence in the record that the appellant actually sold or attempted to sell the drug at the time of the offense. Had either of these circumstances been present, then the dangerous nature of the drug, combined with the dangerous nature of many drug transactions, may have indeed supported the trial court's rejection of this factor as constituting a threat of serious bodily injury.

The court concluded its analysis of the propriety of a bright line rule forbidding consideration of mitigating factor (1) in cocaine cases stating,

> when, as here, (1) the conviction for possession is based only upon constructive possession, and (2) the threat of serious bodily injury is more conceptual than real, little justification exists in having a per se rule that excludes consideration of this mitigating factor. Indeed, a per se exclusion of a particular mitigating factor to an entire class of offenses not always or not inherently involving serious bodily injury undermines the notion of individualized sentencing that underlies the 1989 Criminal Sentencing Reform Act.

Id. at 848-49.

After discussing the per se rule concerning mitigating factor (1), the court focused on whether the trial court's refusal to apply the factor and reduce the defendant's sentence constituted error. In affirming the sentence given by the trial court, the court held, "In rejecting a per se exclusion of this mitigating factor in cocaine possession cases, we do not require that this factor be accorded any especial significance in a given case." Id. at 849.

Upon de novo review, we believe that mitigating factor (1) may apply in the present case because the defendant was only in constructive possession of the cocaine when he was arrested and the record contains little evidence that he was attempting to sell or deliver the cocaine. We do note, however, that the defendant was driving somewhere in the early morning hours before his arrest and, given his prior history of drug offenses, it is certainly plausible that he was on his way to sell or deliver the cocaine. In any event, we would afford the application of this factor little weight. When considering the defendant's work history, we are not prepared to reduce the defendant's sentence under the "catch-all" mitigating factor (13) simply because he had a job when he committed this crime.

In conclusion, we hold that the defendant's prior convictions substantially outweigh the mitigating factor, and we affirm the twenty-year sentence given the defendant by the trial court. We affirm the judgments of the trial court.

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JOSEPH M. TIPTON, JUDGE